STATE OF MICHIGAN

COURT OF APPEALS

MATTHEW HELTON, Plaintiff-Appellant,	FOR PUBLICATION February 4, 2014
v	No. 314857 Oakland Circuit Court Family Division
LISA MARIE BEAMAN and DOUGLAS BEAMAN, Defendants-Appellees.	LC No. 2012-798218-DP Advance Sheets Version

Before: SAWYER, P.J., and O'CONNELL and K. F. KELLY, JJ.

K. F. KELLY, J. (*concurring*).

I concur that the trial court properly denied plaintiff's request to set aside the acknowledgment of paternity in this case. However, I believe that *In re Moiles*, 303 Mich App 59; 840 NW2d 790 (2013),[1] was wrongly decided.[*] The *Moiles* Court concluded that "the Legislature expressly linked a 'determination of paternity' to the section 7 of the Paternity Act," MCL 722.717, and that "the Legislature's use of the phrase 'paternity determination' in MCL 722.1443(4) specifically refers to a 'determination of paternity' under MCL 722.717, and the resulting order of filiation." *Id*. at 75. I disagree. An order revoking an acknowledgment of parentage is plainly an order "setting aside a paternity determination" and, therefore, subject to a best-interest analysis under MCL 722.1443(4). Contrary to the holding in *Moiles*, a trial court may appropriately consider the relevant best-interest factors listed in MCL 722.1443(4) under the Revocation of Paternity Act (RPA), MCL 722.1431 *et seq*., when deciding whether to revoke an acknowledgment of parentage. Accordingly, I concur in the lead opinion's conclusion to affirm.

I. THE ACKNOWLEDGMENT OF PARENTAGE ACT

The Acknowledgment of Parentage Act, MCL 722.1001 *et seq*., provides a mechanism for establishing paternity of a child born out of wedlock:

[1] Application for leave is currently pending.

[*] *Moiles* was reversed in part and vacated in part after the release of this opinion. See *In re Moiles*, 495 Mich 944 (2014)—REPORTER.

> If a child is born out of wedlock, a man is considered to be the natural father of that child if the man joins with the mother of the child and acknowledges that child as his child by completing a form that is an acknowledgment of parentage. [MCL 722.1003(1).]

Further,

> [a]n acknowledgment signed under this act ***establishes paternity***, and the acknowledgment may be the basis for court ordered child support, custody, or parenting time without further adjudication under the paternity act, Act No. 205 of the Public Acts of 1956, being sections 722.711 to 722.730 of the Michigan Compiled Laws. ***The child who is the subject of the acknowledgment shall bear the same relationship to the mother and the man signing as the father as a child born or conceived during a marriage and shall have the identical status, rights, and duties of a child born in lawful wedlock effective from birth.*** [MCL 722.1004 (emphasis added).]

Notably, the affidavit of parentage that the mother and father signed in this case states that "we sign this affidavit to ***establish the paternity*** for this child." Department of Community Health Form DCH-0682 (emphasis added).

"It is no wonder that the definition [of 'child born out of wedlock'] is the same in the Acknowledgment of Parentage Act and the Paternity Act because the acts *simply provide different means to the same end*. Under the Paternity Act [MCL 722.711 *et seq*.], a party can seek a judicial determination of paternity; under the Acknowledgment of Parentage Act, a man and a woman can essentially stipulate the man's *paternity*." *Aichele v Hodge*, 259 Mich App 146, 154-155; 673 NW2d 452 (2003) (emphasis added). " '[T]he Acknowledgment of Parentage Act . . . *establishes paternity*, establishes the rights of the child, and supplies a "basis for court ordered child support, custody, or parenting time without further adjudication under the [P]aternity [A]ct . . . ." ' " *Id*. at 153, quoting *Eldred v Ziny*, 246 Mich App 142, 148; 631 NW2d 748 (2001) (second and third alterations in original). Upon the execution of an acknowledgment of parentage, "*paternity* was established, and the child was in a position identical to one in which the child was born or conceived during a marriage." *Sinicropi v Mazurek*, 273 Mich App 149, 158; 729 NW2d 256 (2006). The rights of a biological father are not superior to the rights of a man who acknowledges parentage. *Id*. at 159 n 2.

I fail to see how an acknowledgment of parentage can be anything other than a determination of the paternity of a child born out of wedlock.

II. THE REVOCATION OF PATERNITY ACT

The RPA[2] provides that a trial court may take a number of actions when presented with a properly filed complaint under the statute. It may

> (a) Revoke an acknowledgment of parentage.
>
> (b) Set aside an order of filiation or a paternity order.
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> (c) Determine that a child was born out of wedlock.
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> (d) Make a determination of paternity and enter an order of filiation as provided for under section 7 of the paternity act, 1956 PA 205, MCL 722.717. [MCL 722.1443(2).]

The act also sets forth various definitions of "father":

> (1) "Acknowledged father" means a man who has affirmatively held himself out to be the child's father by executing an acknowledgment of parentage under the acknowledgment of parentage act, 1996 PA 305, MCL 722.1001 to 722.1013.
>
> (2) "Affiliated father" means a man who has been determined in a court to be the child's father.
>
> (3) "Alleged father" means a man who by his actions could have fathered the child.
>
> (4) "Presumed father" means a man who is presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth. [MCL 722.1433(1) to (4).]

With the exception of "alleged father," the Legislature did not distinguish these categories of father because of some hierarchy or predominant right of one over the other. Rather, both an "acknowledged father" and "affiliated father" have established paternity in alternative ways. And a "presumed father" enjoys the presumption that a child born during his marriage to the mother is his. All three categories of father provide a basis for court-ordered child support, custody, or parenting time without further proceedings under the Paternity Act.

The Legislature then set forth the various methods by which each of these fathers' paternity may be revoked:

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[2] That an acknowledgment of parentage establishes paternity is further supported by the title of this act itself: the Revocation of *Paternity* Act.

(1) Section 7, MCL 722.1437, governs an action to set aside an acknowledgment of parentage.

(2) Section 9, MCL 722.1439, governs an action to set aside an order of filiation.

(3) Section 11, MCL 722.1441, governs an action to determine that a presumed father is not a child's father.

Again, these various methods are not based on a hierarchy of fatherhood, but are based logically on the path taken to establish paternity. For purposes of this case, MCL 722.1437 provides, in relevant part:

> (1) The mother, the acknowledged father, an alleged father, or a prosecuting attorney may file an action for revocation of an acknowledgment of parentage. An action under this section shall be filed within 3 years after the child's birth or within 1 year after the date that the acknowledgment of parentage was signed, whichever is later. The requirement that an action be filed within 3 years after the child's birth or within 1 year after the date the acknowledgment is signed does not apply to an action filed on or before 1 year after the effective date of this act.
>
> (2) An action for revocation under this section shall be supported by an affidavit signed by the person filing the action that states facts that constitute 1 of the following:
>
> (a) Mistake of fact.
>
> (b) Newly discovered evidence that by due diligence could not have been found before the acknowledgment was signed.
>
> (c) Fraud.
>
> (d) Misrepresentation or misconduct.
>
> (e) Duress in signing the acknowledgment.
>
> (3) If the court in an action for revocation under this section finds that an affidavit under subsection (2) is sufficient, the court shall order blood or tissue typing or DNA identification profiling as required under [MCL 722.1443(5)]. The person filing the action has the burden of proving, by clear and convincing evidence, that the acknowledged father is not the father of the child.

I agree with the lead opinion that the trial court's first step should have been a determination of the sufficiency of plaintiff's affidavit. Plaintiff brought suit to revoke defendants' acknowledgment of parentage on the basis of a mistake of fact. Douglas Beaman testified that, at the time he signed the affidavit of parentage, he believed that the child was his. "Regardless of whether [the man] intended to be the father when he signed the affidavit of parentage, and whether he intended to remain the legal father after he learned that he was not the child's biological father, the evidence established that [his] decision to acknowledge paternity in

this case was based, at least in part, on a mistaken belief that he was, in fact, the biological father." *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 190; 740 NW2d 678 (2007).

Because plaintiff's affidavit in support of revocation was sufficient, the trial court was then required to order DNA testing. This had already been done, and the parties do not dispute that plaintiff is the child's biological father. However, MCL 722.1443(5) specifically provides that "[t]he results of blood or tissue typing or DNA identification profiling are not binding on a court in making a determination under this act."

The question becomes what discretion the trial court has to refuse to revoke the acknowledgment of parentage. In cases involving children, the focus is always on their best interests. For example, the Child Custody Act (CCA), MCL 722.21 *et seq*., provides that "[i]f a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control." MCL 722.25(1). "[T]he statutory 'best interests' factors [in MCL 722.23] control whenever a court enters an order affecting child custody." *Harvey v Harvey*, 470 Mich 186, 187 n 2; 680 NW2d 835 (2004); *id*. at 194 ("[P]arties cannot stipulate to circumvent the authority of the circuit court in determining the custody of children. In making its determination, the court must consider the best interests of the children."). Similarly, in the context of termination-of-parental-rights cases brought under Chapter XIIA of the Probate Code, MCL 712A.1 *et seq*., "the history of Michigan's termination-of-parental-rights statute indicates that the focus at the best-interest stage has always been on the child, not the parent," and "to determine whether termination is in the child's best interests, the focus still remains on the child." *In re Moss*, 301 Mich App 76, 87-88; 836 NW2d 182 (2013). When considering whether to terminate parental rights "it is perfectly appropriate for [the] court to refer directly to pertinent best interests factors in the Child Custody Act . . . ." *In re JS Minors*, 231 Mich App 92, 102-103; 585 NW2d 326 (1998), overruled on other grounds by *In re Trejo Minors*, 462 Mich 341 (2000).[3]

The RPA allows a court to consider a child's best interests before entering a judgment revoking paternity. MCL 722.1443(4) provides:

> A court may refuse to enter an order setting aside a paternity determination or determining that a child is born out of wedlock if the court finds evidence that the order would not be in the best interests of the child. The court shall state its reasons for refusing to enter an order on the record. The court may consider the following factors:[4]
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> * * *

[3] This case is not unlike a termination-of-parental-rights case. After signing the acknowledgment of paternity, Douglas Beaman enjoyed the status of legal father. *Aichele,* 259 Mich App at 153. By revoking the acknowledgment, the trial court would effectively have terminated Beaman's parental rights.

[4] Factors (a) through (c) are inapplicable to this case because those factors deal only with "presumed fathers."

(d) The nature of the relationship between the child and the presumed or alleged father.

(e) The age of the child.

(f) The harm that may result to the child.

(g) Other factors that may affect the equities arising from the disruption of the father-child relationship.

(h) Any other factor that the court determines appropriate to consider.

However, the Court in *Moiles* wrongly concluded that these best-interest factors were inapplicable to a case involving revocation of an acknowledgment of parentage. The Court explained its rationale:

> Moiles contends that an acknowledgment of parentage *is* a paternity determination because it establishes a child's paternity. We disagree, and conclude that the trial court correctly determined that an acknowledgment of parentage is not a paternity determination as that term is used in the statute, and therefore, that MCL 722.1443(4) did not apply. An acknowledgment of parentage does establish the paternity of a child born out of wedlock and does establish the man as a child's natural and legal father. However, in MCL 722.1443(2)(d), the Legislature expressly linked a "determination of paternity" to § 7 of the Paternity Act [MCL 722.717]. We conclude that the Legislature's use of the phrase "paternity determination" in MCL 722.1443(4) specifically refers to a "determination of paternity" under MCL 722.717, and the resulting order of filiation.
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> When a statute expressly mentions one thing, it implies the exclusion of other similar things. In this case, while MCL 722.1443 generally applies to any of the actions listed in subsection (2), including the revocation of an acknowledgment of parentage, subsection (4) specifically addresses only paternity determinations and determinations that a child is born out of wedlock. These are only two of the four types of actions that the trial court may take under the Revocation of Paternity Act. Had the Legislature wanted the trial court to make a determination of the child's best interests relative to revoking an acknowledgment of parentage, it could have included language to that effect. But it did not.
>
> Therefore, we conclude that MCL 722.1443(4) did not require the trial court to make a best-interest determination before revoking Moiles's acknowledgment of parentage. [*Moiles*, 303 Mich App at 75-76 (citations omitted).]

However, as I have previously indicated, an acknowledgment of parentage establishes paternity. Adhering to the principles of statutory construction, I would hold that "setting aside a paternity determination" includes the situation at bar in which an alleged father seeks to revoke an acknowledgment of parentage. *Moiles* precludes a consideration of the best-interest factors in

MCL 722.1443(4) by holding that an acknowledgment of parentage is not a paternity determination. Because I strongly disagree with that misstatement of law, I believe that a conflict panel should be convened to resolve the issue. MCR 7.215(J).[5]

The *Moiles* holding that precludes consideration of the best-interest factors in MCL 722.1443(4) leads to the conundrum we have before us. If a trial court cannot consider those factors, but DNA evidence is not "binding on a court in making a determination" on whether to revoke an acknowledgment of parentage, MCL 722.1443(5), then what can the court consider? What discretion may it exercise?

The lead opinion writes:

> When the Legislature repealed the predecessor equitable legal standard for revocation claims, it replaced the equitable standard with the statutory declaration that DNA results are not binding on a court making a determination under the new act. MCL 722.1443(5). That statutory declaration gives circuit courts discretion to consider other factors when determining whether to revoke an acknowledgment of parentage. Because the Legislature did not identify the relevant factors or the legal standard that governs the circuit court's discretion, we consider analogous caselaw to determine the applicable legal standard for assessing the circuit court's decision in this case. [*Ante* at 8.]

In an attempt to provide trial courts with some guidance, the lead opinion invokes the process under the CCA for a change in custody.

I agree with the lead opinion that MCL 722.1443(5), which provides that DNA test results are not binding on a trial court, indicates the Legislature's intent to provide trial courts discretion in these cases. However, I also strongly believe that the Legislature, by including the best-interest factors in MCL 722.1443(4), provided the necessary framework for trial courts to exercise that discretion. I therefore disagree with the lead opinion's conclusion that "the Legislature did not identify the relevant factors or the legal standard that governs the circuit court's discretion . . . ." *Ante* at 8. On the contrary, I believe that the Legislature has left no guess work under the RPA and that there is no need to resort to the CCA for guidance.

As the lead opinion observes, before the RPA was enacted, a section of the Acknowledgment of Parentage Act addressed the revocation of an acknowledgment:

> If the court finds that the affidavit is sufficient, the court *may* order blood or genetic tests at the expense of the claimant, or may take other action the court considers appropriate. The party filing the claim for revocation has the burden of proving, by clear and convincing evidence, that the man is not the father and that, *considering the equities of the case,* revocation of the acknowledgment is proper. [MCL 722.1011(3), as enacted by 1996 PA 305, repealed by 2012 PA 161 (emphasis added).]

[5] The lead opinion appears to acknowledge that *Moiles* may be flawed. *Ante* at 6.

Now the RPA controls such a determination and, rather than a vague reference to the "equities of the case," the RPA lays out specific interests for the trial court to consider in MCL 722.1443(4). I would specifically note that Factor (g) eliminates the vagueness of the previous statute by directing a trial court to specifically consider "[o]ther factors that may affect the equities arising from the disruption of the father-child relationship." MCL 722.1443(4)(g). I believe that the relevant factors listed in MCL 722.1443(4) are to be considered in any action brought under the RPA regardless of how paternity was established. Thus, while I agree with the lead opinion that a child's best interests must be considered, I believe that the best-interest factors set forth in the RPA, and not those found in the CCA, control.

I applaud the lead opinion's attempt to wade through this issue. It is clear that we agree that a child's best interests must inform a trial court's decision whether to revoke paternity. But *Moiles* precludes trial courts from considering the best-interest factors set forth in MCL 722.1443(4), leaving courts to guess what the proper framework should be. Under those circumstances, the lead opinion's reference to the CCA is not wholly illogical. However, *Moiles* is wrong and we should say as much. We ought to convene a conflict panel rather than defer to the flawed analysis in *Moiles*.

III. CONSTITUTIONAL CONSIDERATIONS

While the dissent takes comfort in the fact that this is *only* a revocation-of-paternity case and that a trial court would eventually apply the best-interest factors under the CCA if plaintiff pursued custody further, that position overlooks the fact that the child in this case will be deprived of her fundamental right to maintain a relationship with Beaman, who is her legal father.

" '[A] child's right to family integrity is concomitant to that of a parent[.]' " *O'Donnell v Brown*, 335 F Supp 2d 787, 810 (WD Mich, 2004), quoting *Wooley v Baton Rouge*, 211 F3d 913, 923 (CA 5, 2000). Parents not only have the right to the care and custody of their children, but children also enjoy "parallel rights to the integrity of their family." *In re Anjoski*, 283 Mich App 41, 56; 770 NW2d 1 (2009). Similarly, a child also has a due process liberty interest in his or her family life. *In re Clausen*, 442 Mich 648, 686; 502 NW2d 649 (1993).

In *Grimes v Van Hook-Williams,* 302 Mich App 521, 537; 839 NW2d 237 (2013), we noted that

> the United States Supreme Court has never determined whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. And even if children do have such a constitutional right, it is almost certainly the right to maintain a filial relationship with their *legal* parents. Under the law as it exists in Michigan today, [the alleged father] is simply not one of the child's legal parents. [Quotation marks and citations omitted.]

In executing the acknowledgment of parentage, Beaman established himself as the child's *legal* father. *Sinicropi*, 273 Mich App at 160. Therefore, the child's constitutional rights are necessarily implicated.

That is not to say that the right to a continued relationship with a legal parent is absolute. However, in directing that trial courts may *not* consider the best-interest factors set forth in MCL 722.1443(4), *Moiles* produced the unintended consequence of categorizing children by affording protection to children whose fathers' paternity is either presumed as a result of marriage or established under the Paternity Act and declining such protection to children whose fathers have established paternity through an acknowledgment of parentage. I believe that the best-interest factors in MCL 722.1443(4) apply in all actions brought under the RPA.

Moreover, the mere fact that a child's custody arrangement may not immediately change upon revocation of paternity does not lessen the *legal* consequence of setting aside paternity. If a trial court sets aside paternity and enters an order recognizing a child's biological father as the child's legal father, the biological father will be entitled to all the rights accorded thereto. It is not enough to view an action under the RPA as a mere prelude to a custody battle. If that were the case, then the best-interest factors in the CCA would ensure that the child would maintain permanence and stability. But there are immediate legal ramifications that result upon revoking paternity. What would happen, for example, if the mother were to die? Assuming Beaman's acknowledgment of parentage is set aside, he would now have to seek custody as a third party and there is no guarantee that he would succeed or even have standing. See MCL 722.26c; *Anjoski*, 283 Mich App 41. The child enjoys a legal relationship with Beaman, and that relationship should not be destroyed absent a finding that it is in the child's best interests, using the best-interest factors in MCL 722.1443(4).

IV. LACHES AS AN EQUITABLE DEFENSE

Finally, I believe that the equitable defense of laches applies in this case and that plaintiff should have been precluded from bringing this action nine years after the child's birth. As such, it provides an additional basis to affirm.

> Laches is an affirmative defense based primarily on circumstances that render it inequitable to grant relief to a dilatory plaintiff. The doctrine of laches is triggered by the plaintiff's failure to do something that should have been done under the circumstances or failure to claim or enforce a right at the proper time. "The doctrine of laches is founded upon long inaction to assert a right, attended by such intermediate change of conditions as renders it inequitable to enforce the right." But "[i]t has long been held that the mere lapse of time will not, in itself, constitute laches." "The defense, to be raised properly, must be accompanied by a finding that the delay caused some prejudice to the party asserting laches and that it would be inequitable to ignore the prejudice so created." The defendant bears the burden of proving this resultant prejudice. [*Attorney General v PowerPick Player's Club of Mich*, *LLC*, 287 Mich App 13, 51; 783 NW2d 515 (2010) (citations omitted).]

"If a plaintiff has not exercised reasonable diligence in vindicating his or her rights, a court sitting in equity may withhold relief on the ground that the plaintiff is chargeable with laches" and may simply "leave[] the parties where it finds them." *Knight v Northpointe Bank*, 300 Mich App 109, 114; 832 NW2d 439 (2013). "This is so because equity will not lend aid to those who are not diligent in protecting their own rights." *Id*.

Plaintiff suspected that he was the child's father from the start of the mother's pregnancy. In fact, plaintiff testified that he, the mother, and Beaman all sat down during the pregnancy to discuss what would happen in the event that plaintiff was the biological father. Nevertheless, plaintiff failed to file a notice of intent to claim paternity, as is allowed under MCL 710.33(1) ("Before the birth of a child born out of wedlock, a person claiming under oath to be the father of the child may file a verified notice of intent to claim paternity . . . ."). A DNA test was administered in 2003 within two months after the child's birth, but because plaintiff allegedly could not afford the fee, the results were not revealed until three years later in 2006. Plaintiff's first attempt to establish paternity was in 2010 when the child was seven years old. That action was dismissed because defendant and Beaman got married and, consequently, plaintiff was deprived of standing. Thus, from the time before the child was born until she was seven years old, plaintiff took absolutely no action to establish paternity. He sat on his rights, with the resultant prejudice being that the child lived in a familial and custodial environment with her mother and Beaman, *her legal father*, for nine years.

MCL 722.1437(1) provides that an individual bringing an action to revoke an acknowledgment of parentage must do so "within 3 years after the child's birth or within 1 year after the date that the acknowledgment of parentage was signed, whichever is later." However, the Legislature further provided that "[t]he requirement that an action be filed within 3 years after the child's birth or within 1 year after the date the acknowledgment is signed does not apply to an action filed on or before 1 year after the effective date of this act." While plaintiff's action under the RPA was timely, the fact that a party brings a claim within the limitations period does not necessarily defeat a laches defense. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 457; 761 NW2d 846 (2008) ("[L]aches may bar a legal claim even if the statutory period of limitations has not yet expired.").

I do not believe that in passing the RPA the Legislature intended to defeat the common-law defense of laches. In rejecting the idea that the doctrine of avoidable consequences was abrogated by the adoption of comparative negligence, this Court recently explained:

> "The common law remains in force until 'changed, amended or repealed.' " "There is no question that both [our Supreme] Court and the Legislature have the constitutional power to change the common law." However, "[w]e will not lightly presume that the Legislature has abrogated the common law. Nor will we extend a statute by implication to abrogate established rules of common law." Absent "a contrary expression by the Legislature, well-settled common-law principles are not to be abolished by implication . . . ." "Rather, the Legislature should speak in no uncertain terms when it exercises its authority to modify the common law." [*Braverman v Granger*, 303 Mich App 587, 596-597; 844 NW2d 485 (2014) (citations omitted) (alterations in original.]

Plaintiff had the ability to establish paternity during the pregnancy and also in the seven years following the child's birth before defendant married Beaman. I find the delay in doing so inexcusable and that the equitable defense of laches applies.

I agree that the matter should be affirmed, albeit for different reasons.

/s/ Kirsten Frank Kelly